

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON

Assigned On Briefs October 1, 2013

STATE OF TENNESSEE v. HENRY BATES

**Appeal from the Criminal Court for Shelby County
No. 10-02856 James C. Beasley, Jr., Judge**

No. W2012-02718-CCA-R3-CD - Filed February 28, 2014

Appellant, Henry Bates, was convicted by a Shelby County jury of aggravated robbery, burglary of a building, and vandalism of \$1,000 or more. The trial court sentenced Appellant to an effective sentence of forty-two years. On appeal, Appellant argues that the evidence was insufficient to support his conviction for aggravated robbery and that the trial court erred in denying his motion for mistrial. After a thorough review of the record, we conclude that both issues are without merit. Therefore, we affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Trial Court are Affirmed.

JERRY L. SMITH, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and NORMA MCGEE OGLE, J., joined.

Stephen C. Bush, Public Defender and Barry W. Kuhn, Assistant Public Defender, for the appellant, Henry Bates.

Robert E. Cooper, Jr., Attorney General and Reporter; Kyle Hixson, Assistant Attorney General; Amy P. Weirich, District Attorney General; and Stacy McEndree, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual Background

On July 29, 2009, Derrick Hubbert was working at a Mapco Express in Memphis. His shift was from 10:00 p.m. to 6:00 a.m. At 10:00 p.m., he locked the doors to the store, but he helped customers through a service window. At some point after midnight, Herbert looked out of the front window and saw a white pick-up truck pull into the parking lot and

begin backing up toward the store in an accelerated manner. Hubbert set off the silent alarm system. The pick-up truck crashed into the front window of the store. The impact shook the building and shattered the glass of the windows of the front of the building. It also dislodged the drink machine and the ATM.

Two to three men jumped out of the truck and ran inside the store. Hubbert remembered what two of the men were wearing. One man wore a gold or tan shirt with a ski mask over his face. The other man wore a black shirt and pantyhose over his head. Hubbert testified that the pantyhose over the man's face was loose and did not disguise his appearance.

When they ran into the store, one of the men yelled "Don't move, you won't get shot." They told Hubbert this twice. Hubbert said that he saw the outline of a gun sticking out of the pants of the man wearing the gold shirt. The gun was covered by the man's shirt. Hubbert stared at the outline of the gun for most of the time that the men were in the store. The men grabbed the store's ATM machine and put it in the truck. The men left with the ATM machine.

Officers with the Memphis Police Department arrived shortly thereafter. Officer Marcus Everett stated that Hubbert was "a nervous wreck." He stated that there was severe damage to the front of the store. Officer Everett watched the surveillance tape and saw three men enter the store after the truck rammed the building. Officer Everett sent out an alert to search for the perpetrators. Officer Lee Walker was also at the scene. He left the store and went to the apartment complex next door. He searched the parking lot and found a heavily-damaged, older-model, white Ford pick-up truck with glass and concrete debris in its bed.

Detective Steven Lovelace, a detective with the Germantown Police, also investigated the case at hand. He developed a suspect by the name of Martin Strong. Strong had approached Deljuan Williams the night of the robbery and asked Williams if they could use Williams's brother's shop. Williams met Strong and Appellant at the shop. They were driving a black Ford Explorer. A third man arrived in another vehicle. The men proceeded to use a blowtorch to cut open an ATM machine and take the money. They left the ATM in a field behind the shop. Detective Lovelace later arrested Strong and found \$2,580 in twenty dollar bills on his person.

Officers searched the field behind the shop. They found pieces of an ATM that had been cut and burnt. They also found a long-sleeved tan shirt, a short-sleeved "mustardy brown" shirt, a dark pair of black pants, and a long button-up black shirt.

As a result of their investigation, officers were able to produce some mug shots to show Hubbert. Hubbert identified Appellant as the man who put the ATM in the bed of the truck. Furthermore, Hubbert identified Appellant at trial as the man with the loose pantyhose over his face. He stated that because the pantyhose was loose it shifted, and he was able to identify him.

A jury convicted Appellant of all charges. The trial court sentenced Appellant to thirty years for the aggravated robbery conviction and twelve years each for the burglary and vandalism. One of the twelve-year sentences and the thirty-year sentence were ordered to be run consecutively to each other and concurrently with the remaining twelve-year sentence. Appellant's effective sentence is forty-two years.

ANALYSIS

Sufficiency of the Evidence

Appellant argues that the evidence was insufficient to support his conviction for aggravated robbery because "the facts do not establish that a deadly weapon was used to accomplish the theft. The victim here never saw a deadly weapon." The State disagrees.

To begin our analysis, we note that when a defendant challenges the sufficiency of the evidence, this Court is obliged to review that claim according to certain well-settled principles. A verdict of guilty, rendered by a jury and "approved by the trial judge, accredits the testimony of the" State's witnesses and resolves all conflicts in the testimony in favor of the State. *State v. Cazes*, 875 S.W.2d 253, 259 (Tenn. 1994); *State v. Harris*, 839 S.W.2d 54, 75 (Tenn. 1992). Thus, although the accused is originally deemed with a presumption of innocence, the verdict of guilty removes this presumption and replaces it with one of guilt. *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997); *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). Hence, on appeal, the burden of proof rests with the defendant to demonstrate the insufficiency of the convicting evidence. *Id.*

The relevant question the reviewing court must answer is whether any rational trier of fact could have found the accused guilty of every element of the offense beyond a reasonable doubt. Tenn. R. App. P. 13(e); *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979). In making this decision, we are to accord the State "the strongest legitimate view of the evidence as well as all reasonable and legitimate inferences that may be drawn therefrom." *See Tuggle*, 639 S.W.2d at 914. As such, this Court is precluded from re-weighing or reconsidering the evidence when evaluating the convicting proof. *State v. Morgan*, 929 S.W.2d 380, 383 (Tenn. Crim. App. 1996); *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Moreover, we may not substitute our own "inferences for those drawn by

the trier of fact from circumstantial evidence. *Matthews*, 805 S.W.2d at 779. Further, questions concerning the credibility of the witnesses and the weight and value to be given to evidence, as well as all factual issues raised by such evidence, are resolved by the trier of fact and not the appellate courts. *State v. Pruett*, 788 S.W.2d 599, 561 (Tenn. 1990).

The guilt of a defendant, including any fact required to be proved, may be predicated upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. *See State v. Pendergrass*, 13 S.W.3d 389, 392-93 (Tenn. Crim. App. 1999). Even though convictions may be established by different forms of evidence, the standard of review for the sufficiency of that evidence is the same whether the conviction is based upon direct or circumstantial evidence. *See State v. Dorantes*, 331 S.W.3d 370, 379 (Tenn. 2011). As such, all reasonable inferences from evidence are to be drawn in favor of the State. *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn.1978); *see Tuggle*, 639 S.W.2d at 914.

Appellant raises this issue in regard to his conviction for aggravated robbery. Robbery is the “intentional or knowing theft of property from the person of another by violence or putting the person in fear.” T.C.A. § 39-13-401(a). A robbery becomes aggravated either when the victim is seriously injured or when the defendant “display[s] . . . any article used . . . to lead the victim to reasonably believe it to be a deadly weapon.” T.C.A. § 39-13-402(a).

This Court has stated:

This court has affirmed convictions of aggravated robbery when the defendant’s demand for money coupled with his maintaining a hand in his pocket, even when the hand was not positioned to evoke the image of a gun or any other weapon, led the victim to reasonably believe the defendant was armed, often by verbally threatening to harm the victim. *See, e.g., State v. Aaron Cooper*, No. 01C01-9708-CR-00368, slip op. at 7 (Tenn. Crim. App., Nashville, Sept. 29, 1998) (defendant “held his hand in the waistband of his pants ‘as if he had a weapon,’ and said . . . ‘Don’t make me have to hurt you’”); *State v. Frederick Corlew*, No. M2001-00842-CCA-R3-CD, slip op. at 4 (Tenn. Crim. App., Nashville, Nov. 1, 2002) (defendant kept “his right hand . . . in his right pants pocket as he came in and [it] remained there as he walked past the cash register and even after he came around the counter and was standing with the victim, demanding her to ‘open the register’”). We have observed that the “common threads” in those cases where no actual deadly weapon was displayed “are: 1) a hand concealed in an article of clothing; and

2) a threat – express or implied – that caused the victim to ‘reasonably believe’ the offender had a deadly weapon and was not opposed to using it.” *State v. Monoletto D. Green*, No. M2003-02774-CCA-R3-CD, slip op. at 10 (Tenn. Crim. App., Nashville, May 5, 2005).

State v. Charles Clevenger, No. E2013-00770-CCA-R3-CD, 2014 WL 107984, at *4 (Tenn. Crim. App., at Jackson, Jan. 13, 2014).

In the case at hand, Hubbert testified that the men crashed into the store and twice said “Don’t move, and you won’t get shot.” Clearly, this is a verbal threat that would cause an individual to reasonably believe that the men had a gun. Furthermore, Hubbert testified that he saw the outline of a gun under the shirt of one of the men. As stated above, we have previously held that even a hand hidden by a shirt so that it looked like a gun is enough to support a conviction for aggravated robbery.

We conclude that the threat by the men coupled with the fact that Hubbert testified that he saw the outline of a gun under a shirt is enough for a rational trier of fact to determine that the men “display[ed] . . . any article used . . . to lead the victim to reasonably believe it to be a deadly weapon.” See T.C.A. § 39-13-402(a).

Therefore, this issue is without merit.

Mistrial

Appellant also argues that the trial court erred in denying his request for a mistrial when an officer stated that they recovered three ATM machines during the investigation based on information gathered from the co-defendant. The State disagrees.

In the case at hand, the following exchange occurred on direct examination of Detective Lovelace:

Q. Now, you indicated that after you spoke with Mr. Strong, you released him that night?

A. Yes, ma’am.

Q. And you indicated that this person you knew as Mr. Deljuan Williams was with him when you first went to pick him up?

A. That’s correct.

Q. Did you pick up and speak with Mr. Williams as well?

A. We did.

....

Q: . . . Now, after you let him go, and then eventually let Mr. Strong go that night, what did you do next as regards to that investigation?

A. Well, based on what Mr. Strong told us, we recovered three of the ATM machines that evening. Two were at a house off of Chelsea --

At this point, Appellant's trial counsel asked to approach the bench and moved for a mistrial. The trial court denied the motion and gave the following curative instruction to the jury:

All right, ladies and gentlemen, before you went out, Sergeant Lovelace mentioned something about some other ATM machines at a house.

You need to understand, ladies and gentlemen, [Appellant] is not charged with any other offenses. He's not been arrested for any other offenses. He was not even accused of any other offenses. Okay?

We are trying this set of facts that we are here today. Any reference to any other ATM machines relate only to Mr. Strong and they have no bearing whatsoever in this trial. Does everybody understand that?

They don't have any bearing whatsoever and you're not to draw any inferences from that, you're not to speculate about that.

I'm telling you as a matter of law, based upon everything I know, [Appellant] was not charged, [Appellant] was not arrested, he was not even accused in any other incident.

This is the only incident we're concerned with. Does everybody understand that? Okay.

The purpose of a mistrial is to correct the damage done to the judicial process when some event has occurred which would preclude an impartial verdict. *See Arnold v. State*, 563 S.W.2d 792, 794 (Tenn. Crim. App. 1977). The decision whether to grant a mistrial is within the trial court's discretion and will not be disturbed absent an abuse of that discretion. *State v. Millbrooks*, 819 S.W.2d 441, 443 (Tenn. Crim. App. 1991) (citing *State v. Hall*, 667 S.W.2d 507, 510 (Tenn. Crim. App. 1983)). For this reason, an appellate court's review

should provide considerable deference to the trial court's ruling in determining whether an occurrence or event at trial has so prejudiced the defendant or the State as to preclude a fair and impartial verdict. *See State v. Williams*, 929 S.W.2d 385, 388 (Tenn. Crim. App. 1996).

We conclude that the trial court did not abuse its discretion here. The testimony in question was in reference to Appellant's co-defendant and referred to two ATM machines that were discovered at a different location that was behind Williams's brother's shop, where the ATM involved in Appellant's case was found. The trial court took immediate steps to prevent undue prejudice to the defendant. *See State v. Adkins*, 786 S.W.2d 642, 644 (Tenn. 1990) (holding that a mistrial was not required following a witness's outburst where the trial court took immediate action to dispel prejudice); *see also State v. Mathis*, 969 S.W.2d 418, 422 (Tenn. Crim. App. 1997) (holding that "[i]n light of the limited nature of the offending testimony and the trial court's prompt curative instruction, the trial court did not abuse its discretion in refusing to grant a mistrial").

This issue is without merit.

CONCLUSION

For the foregoing reasons, we affirm the judgments of the trial court.

JERRY L. SMITH, JUDGE